Supreme Court, U.S.
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No. 99 201

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

UNITED STATES OF AMERICA ex rel.

GABRIEL PEREZ,

Petitioner,

vs.

WILLIAM D. O'SULLIVAN, Warden,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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(1a) QUESTIONS PRESENTED

In a habeas proceeding on behalf of petitioner, a State prisoner, who claimed (a) he made custodial statements before being Mirandized, and (b) his subsequent purported Miranda waiver was not voluntary:

I. Were defendant's non-Mirandized custodial statements unconstitutionally used against him at trial? More specifically:

A. Did the District Court improperly refuse to apply a *de novo* standard as required by Thompson v. Keohane, 516 U.S. 99, 133 L.Ed.2d 383 (1995), thereby ruling in essence that the AEDPA obliterates that holding, therefore approving the Illinois courts' determination that petitioner was not

"in custody" for Miranda purposes when he made statements that were used against him?

B. Did the District Court improperly determine that the Illinois courts' determination that defendant was thus not "in custody" was not unreasonable under the AEDPA?

II. Did defendant voluntarily waive his Miranda rights, rendering admissible his post-Miranda statements? More specifically:

A. Did the District Court improperly determine that the Illinois Appellate Court, though applying an improper standard of review, nonetheless reached the correct conclusion that defendant had voluntarily waived his Miranda rights?

B. Can the Illinois Appellate Court's factual findings be accepted by the District Court although the Appellate Court was proceeding under a [now-determined-to-be] improper standard of review?

III. Should certificate of appealability have been allowed to permit review by the Court of Appeals of the issues presented in this case, which involve questions which are (a) deserving of review and (b) clearly debatable among reasonable jurists?

IV. Alternatively - should the appeal be allowed to proceed without requirement that petitioner obtain a certificate of appealability, because the requirement violates the basic constitutional due process right of

access to the courts, in that only unsuccessful habeas petitioners - and not unsuccessful governmental respondents - are required to obtain such certificate?

1(b) PARTIES INVOLVED

Petitioner, Gabriel Perez, was the Petitioner in the U.S. District Court for the Northern District of Illinois, and Petitioner-Appellant in the U.S. Court of Appeals for the 7th Circuit.

Respondent, William D. O'Sullivan, Warden, was the Respondent[1] in the U.S. District Court for the Northern District of Illinois, Eastern Division, and Respondent-Appellee in the U.S. Court of Appeals for the 7th Circuit.

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[1] When petitioner filed his petition, he was in the custody of Thomas Page, the Warden of Menard Correctional Center. After petitioner was transferred to the Western Illinois Correctional Center, by agreement of the parties, the District Court substituted William D. O'Sullivan, the Warden of that facility, as party respondent. (App. A, p. App. 1, fn. 1)

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The District Court, via unreported order ("Memorandum Opinion and Order"), denied habeas relief on October 6, 1998 (App. A, pp. App. 1-39), and declined to issue certificate of appealability. (See App. B, pp. App. 40-41.)

The order of the U.S. Court of Appeals for the 7th Circuit, April 30, 1999, denying certificate of appealability and denying request to proceed without certificate of appealability (App. B, pp. App. 40-41), is not reported.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Gabriel Perez, (hereafter, petitioner, or defendant), prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the 7th Circuit, allowing to stand, by denying certificate of appealability and denying request to proceed without certificate of appealability, the judgment of the U.S. District Court for the Northern District of Illinois, Eastern Division, denying his petition for habeas corpus - by which he sought relief from his murder conviction and sentence of 39 years.

Judgment and Orders Below

The Judgment sought to be reviewed

is the Memorandum Opinion and Order of the District Court dated October 6, 1998, denying habeas relief (App. A, pp. App. 1-39), which the 7th Circuit permitted to stand when, by Order of April 30, 1999, it denied certificate of appealability and request to proceed without such certificate. (App. B, pp. App. 40-41) The Orders are unreported.

Jurisdictional Statement

On April 30, 1999, the Court of Appeals issued its Order (App. B, pp. App. 40-41) denying certificate of appealability and denying request to proceed without such certificate, which Order allowed to stand, the judgment of the District Court denying habeas on October 6, 1998. (App. A, pp. App. 1-39) This Petition is timely filed within 90

days thereafter. Jurisdiction is invoked under 28 U.S.C. § 1254(1) and Rules 10, 12 and 13 of this Court.

Basis for Federal Jurisdiction

The basis for federal jurisdiction in the court of first instance is 28 U.S.C. § 2254(a).

Constitutional Provisions, Statutes and Rules Involved

The 5th and 6th Amendments to the U.S. Constitution [rights protected via Miranda v. Arizona]; the AEDPA; 28 U.S.C. 2253(c); 28 U.S.C. 2254 (as amended - AEDPA); due process clauses of the 5th and 14th Amendments to the U.S. Constitution. F.R.App.P. 22(b) is set out in App. C, pp. App. 42-43.

STATEMENT OF THE CASE

Defendant, Gabriel Perez, an

Illinois State prisoner, sought to appeal from the District Court's judgment denying his petition for a writ of habeas corpus, in which defendant raised, *inter alia*, the claims that he made statements that were used against him at trial, obtained (a) while he was in custody and before he was given Miranda warnings, and (b) after he was Mirandized, following a purported Miranda waiver that was not constitutionally valid/voluntary. The District Court denied habeas in a Memorandum Opinion and Order. (App. A; pp. App. 1-39) The 7th Circuit denied certificate of appealability and request to proceed without such certificate. (App. B, pp. App. 40-41) No petition for rehearing was filed.

STATEMENT OF FACTS

Defendant was found guilty by a jury of murder and sentenced to 39 years. The facts of the offense are not set out in the District Court's Memorandum Opinion (App. A). By way of synopsis for present purposes:

Defendant - in the course of a driving lesson with an adult driving instructor and three (3) other students in the car - was driving a car in which a passenger was shot and killed. It was only via convoluted inferences drawn from outwardly innocent circumstances,[2]

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[2] Defendant's contested statements do NOT admit any part in the homicide. Rather, his statements only show that an early statement that he had received a page from his mother, was not true. This falsehood was used to bolster an otherwise altogether circumstantial

(continued...)

that he was ultimately charged and convicted. Specific facts as to the Miranda issues raised in this Petition:

After the shooting, defendant drove the victim to the hospital, and was instructed to go from the hospital to a police station by Sgt. Mark McCormick - an officer he, defendant, had reason to believe had the authority to force defendant's arrest, even as a possible witness to a crime. This officer had - as found by the trial court (C 113) - illegally [without probable cause] arrested defendant at his home on a prior occasion.[3] McCormick admitted he

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[2](...continued)
case.

[3] I.e., on May 24, 1993, defendant was arrested at his home (Tr. 491-93) - (continued...)

had gained entry to defendant's home by threatening to kick the door in (Tr. 707), in a situation where the officer knew only that defendant was a witness to a crime. (Tr. 707-11) Sgt. McCormick testified he gained entry by threatening to kick the door down:

> "Q. What happened then?
>
> A. I yelled at him to open the door otherwise I would kick it in." (Tr. 707)

Defendant had been transported from the hospital in a locked car (Tr. 218); was told he must go (Tr. 217)[4]; he was

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[3](...continued)
an arrest the State trial court expressly found was without probable cause. (C 113)

[4] Pursuant to instructions from Sgt. McCormick to defendant (Tr. 783) and other officers, Off. Heavey arrived at the hospital to transport defendant
(continued...)

placed into the locked portion of the station; he was isolated; his mother was not permitted to have more than 30 seconds to speak to him (Tr. 219-20); he was not permitted to have his mother present. (Tr. 220) He was not told he was free to leave. (Tr. 149, 151) He was never told he need not answer questions. (Tr. 149) He was in a locked room (Tr. 219), in a part of the police station isolated from the general public. (Tr. 219)

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[4](...continued)
to the police station shortly after 8:30 p.m. (Tr. 3-4) Heavey testified he "just asked him are you ready to go," and defendant said, "yes." (Tr. 6); defendant was not told he did not have to go to the police station. (Tr. 9-10) Heavey testified: "I believe I said, 'Are you ready to go?'" (Tr. 10) When asked, "Did you give him the option of not going," Heavey replied, "No." (Tr. 10)

REASONS FOR GRANTING CERTIORARI

I. Defendant's custodial statements made before he was Mirandized were unconstitutionally used against him at trial. More specifically:

A. The District Court improperly refused to apply a *de novo* standard as required by Thompson v. Keohane, 516 U.S. 99, 133 L.Ed.2d 383 (1995), thereby ruling in essence that the AEDPA obliterates that holding, therefore approving the Illinois courts' determination that petitioner was not "in custody" for Miranda purposes when he made statements that were used against him. The statute cannot overrule this Court's Thompson holding as to the constitutionally required standard of review in the habeas context.

The District Court's rejection of the *de novo* standard of review as to the issue of custody for Miranda purposes as per Thompson v. Keohane, 516 U.S. 99, 133 L.Ed.2d 383 (1995), is based on its perception that Thompson is limited to FORMER (pre-AEDPA) sec. 2254, and that

the AEDPA's provision for deferential review [28 U.S.C. 2254(d)] WIPED OUT the holding of Thompson v. Keohane for federal habeas purposes in cases involving State prisoners. (App. A, pp. App. 15-16) If so, the AEDPA is unconstitutional.

The District Court did not cite any federal decision not applying Thompson's *de novo* standard to the issue of custody for Miranda purposes in a habeas proceeding subject to the AEDPA.

The reasons this Court stated in Thompson for holding that *de novo* review is required, are compelling reasons why, if [*arguendo*] the AEDPA requires deferential review instead of *de novo* review of this issue, the AEDPA is unconstitutional - because according to

this Court in Thompson, *de novo* review by the habeas court of the State court's decision as to custody for Miranda purposes is **necessary as a matter of federal enforcement of federal constitutional rights** - to "guide police, unify precedent, and stabilize the law." Thompson, 133 L.Ed.2d at 396.

In Thompson, this Court explained why *de novo* review on federal habeas is required on this issue:

> "Two discrete inquiries are essential to the [ultimate 'in custody' determination for *Miranda* purposes]: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." Thompson, 133 L.Ed.2d at 394.

While the first inquiry [circumstances surrounding interrogation], is a

distinctly factual inquiry, appropriate for a presumption of correctness of the State court finding, ibid.:

> "the second inquiry, however, calls for application of the controlling legal standard to the historical facts. This ultimate determination, we hold, presents a 'mixed question of law and fact' qualifying for independent review." Ibid.

The bottom line:

> "Classifying 'in custody' as a determination qualifying for independent review should serve legitimate law enforcement interests as effectively as it serves to insure protection of the right against self-incrimination. As our decisions bear out, the law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law." Id. at 396.

This Court concluded:

> "[O]nce the historical facts are resolved, the state court is not 'in an appreciably better position than the federal habeas court to make [the ultimate] determination' of the consistency of the law

> enforcement officer's conduct with the federal *Miranda* warning requirement." Ibid.

"'[I]n custody' determinations do guide future decisions." Id. at 395-96.

Thus, in Thompson, this Court held that the Constitution requires de novo review of the custody issue in habeas proceedings. Accordingly, any attempt by Congress via the AEDPA to obliterate the constitutionally-compelled, well-reasoned Thompson holding, is unconstitutional.

B. The District Court improperly determined that the Illinois courts' determination that defendant was thus not "in custody" was not unreasonable under the AEDPA.

In any event, if the AEDPA standard is held to apply here, the State "not in custody" determination was unreasonable, even as per the AEDPA. In determining to

follow the State court's determination of "no custody," the District Court utilized a standard re "reasonableness" from Lindh v. Murphy, 96 F.3d 856, 868 (7 Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320 - a standard NOT ever adopted as such by this Court. The District Court also utilized "reasonableness" language from Hennon v. Cooper, 109 F.3d 330, 335 (7 Cir. 1997), cert. denied, 118 S.Ct. 72 (1997) - also, not ever adopted by this Court. The District Court did not utilize any definitive Supreme Court decision on "reasonableness". (See App. A, pp. App. 5-8, App. 11-18.)

Even utilizing the "reasonableness" configurations as per the District Court, the State court holding is

"unreasonable" when one considers the undisputed underlying facts re custody. (See pp. 6-9, supra.) Considering the testimony actually given - the Record - it is patently unreasonable to conclude that defendant was NOT in custody. The facts show that under Thompson, he was in custody before he was Mirandized.

Defendant was, under law, in custody,[5] because he was treated in a manner to cause a citizen, especially this 16 year old,[6] to believe he was in

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[5] Hence, any statement obtained after interrogation without warnings as to his constitutional rights must be excluded, per Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694 (1966).

[6] In evaluating whether defendant was in "custody," the Court must take special note that defendant was sixteen, and therefore a heightened standard of caution applies. Haley v. Ohio, 332 U.S. 596, 599, 92 L.Ed. 224, 228 (1948); (continued...)

custody. The prior conduct of Sgt. McCormick (see pp. 6-7, supra and pp. 22-26, infra) would cause defendant to believe he had to comply with the same officer's direction to travel to the police station. No other police action would dissipate defendant's objectively reasonable belief he was in custody.

Defendant's prior dealings with the

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[6](...continued)
Quartararo v. Mantello, 715 F.Supp. 449 (E.D.N.Y. 1989) (finding custody; granting habeas); *aff'd without opinion*, 888 F.2d 126 (2 Cir. 1989).

Moreover, there is a growing judicial trend requiring suppression of statements obtained from a youth whose interested parent is denied access; in such cases, the reviewing court presumes coercion and requires suppression. See, e.g., In re J.J.C., 294 Ill.App.3d 227, 689 N.E.2d 1172, 228 Ill.Dec. 751 (2 Dist. 1998); In re L.L., 295 Ill.App.3d 594, 693 N.E.2d 908, 230 Ill.Dec. 908 (2 Dist. 1998). Here, the Illinois courts' failure to apply its own holdings to this effect, further demonstrates the unreasonableness of its finding here.

very officer who caused him to be transported to the station would cause him to feel pressured, and in custody. (See pp. 6-9, supra.)

Controlling authority demonstrates that defendant was in a coercive setting - that he was in custody - requiring Miranda warnings; and that the State court decision that he was not, was absolutely wrong and unreasonable, contrary to decisions of this Court, and as applied by lower court decisions.[7] Decisions of this Court demonstrate that defendant was in custody. See Florida

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[7] Lower court decisions applying Supreme Court precedent are relevant points of comparison for determining whether State court's application of federal law is "unreasonable" under the AEDPA. United States ex rel. Gooch v. McVicar, 953 F.Supp. 1001 (N.D. Ill. 1997).

v. Royer, 460 U.S. 491, 496, 504, 75 L.Ed.2d 229 (1983); Dunaway v. New York, 442 U.S. 200, 60 L.Ed.2d 824 (1979). As in Orozco v. Texas, 394 U.S. 324, 327, 22 L.Ed.2d 311, 315 (1969), "defendant was not free to leave," and as in Orozco, defendant, when not permitted to have his mother present, was both isolated and "otherwise deprived of his freedom of action." Ibid.[8]

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[8] Lower court decisions (see fn. 7, p. 17, supra) interpreting such Supreme Court decisions, include: E.g., Sprosty v. Buchler, 79 F.3d 635, 641-43 (7 Cir. 1996). See the following decisions, all finding "custody" for Miranda purposes - utilizing analysis as in these decisions, the present State holding of "no custody" is unreasonable:

Second Circuit: Tankleff v. Senkowski, 135 F.3d 235, 242-44 (2 Cir. 1998); United States v. Ali, 68 F.3d 1468, 1472-73 (2 Cir. 1995), on rehearing, 86 F.3d 275 (2 Cir. 1996) (vacated and remanded for new trial, under Thompson v. Keohane); Quartararo

(continued...)

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[8](...continued)
v. Mantello, 715 F.Supp. 449 (E.D.N.Y. 1989) (finding custody; granting habeas); *aff'd without opinion*, 888 F.2d 126 (2 Cir. 1989); see also United States v. Ceballos, 812 F.2d 42, 48 & 48 n.3 (2 Cir. 1987) (finding custody; applying Dunaway v. New York, supra, and standards set out in the American Law Institute's Model Penal Code, Model Code of Pre-Arraignment Procedure § 110-1, commentary at 261 (1975));

Fourth Circuit: Moore v. Ballone, 658 F.2d 218 (4 Cir. 1981);

Fifth Circuit: United States v. Del Soccorro Castro, 573 F.2d 213 (5 Cir. 1978);

Sixth Circuit: United States v. Mahar, 801 F.2d 1477, 1499-1500 (6 Cir. 1986);

Seventh Circuit: United States v. Madoch, 149 F.3d 596, 600-01 (7 Cir. 1998);

Eighth Circuit: United States v. Longbehn, 850 F.2d 450, 452-53 (8 Cir. 1988); United States v. Carter, 884 F.2d 368, 371-72 (8 Cir. 1989); United States v. Griffin, 922 F.2d 1343 (8 Cir. 1990)

Ninth Circuit: United States v. Beraun-Panez, 812 F.2d 578, modified, 830 F.2d 127 (9 Cir. 1987); United States v. Scharf, 608 F.2d 323 (9 Cir. 1979);

Tenth Circuit: United States v. Griffin, 7 F.3d 1512 (10 Cir. 1993);

(continued...)

Here, it is uncontested that defendant was in a locked room, in a part of the police station isolated from the general public. (Tr. 219)

Hence, defendant's statement to Officer Mormino, given after defendant is ordered to go to the police station, and is isolated from his mother, is a statement given when defendant was in custody without Miranda warnings. It is a statement obtained in violation of the 5th and 6th Amendments to the U.S. Constitution. It must be suppressed.

The State court decision, improperly accepted by the District Court, that defendant here was NOT in

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[8](...continued)
United States v. DiGiacomo, 579 F.2d 1211, 1214 (10 Cir. 1978).

custody, is an unreasonable application of federal law as applied by the lower federal courts, interpreting and applying U.S. Supreme Court precedent.

II. After defendant was Mirandized and purportedly waived his Miranda rights, further statements were used against him. This purported Miranda waiver was unconstitutional/involuntary.

A. The District Court improperly determined that the Illinois Appellate Court, though applying an improper standard of review, nonetheless reached the correct conclusion that defendant had voluntarily waived his Miranda rights.

While holding that the State court applied an incorrect (deferential) standard of review re waiver of Miranda rights - for Ornelas v. United States, 517 U.S. 690, 134 L.Ed.2d 911 (1996), requires that this issue be reviewed *de novo* (App. A, pp. App. 9-10) - the District Court, following principles of

Ornelas as applied in United States v. Mills, 122 F.3d 346 (7 Cir. 1997), then proceeded to conduct its own *de novo* review. (App. A, pp. App. 11-12)

The District Court's conclusion that even under the correct, *de novo* standard, defendant knowingly and voluntarily waived his Miranda rights (App. A, pp. App. 11-12), is wrong.

The District Court's conclusion that defendant "was not subject to coercive police activity before he waived his Miranda rights," (App. A, p. App. 11) - thus, discounting the coercive impact of defendant's prior arrest by the same officer who caused his transportation to the police station here (Order p. 11) - is utterly unreasonable, because it flies in the

face of the actual, historical facts of record. The District Court was blind to the most crucial fact that Sgt. McCormick, the "same police officer who had previously arrested petitioner" (App. A, p. App. 11), had not merely previously arrested defendant in some innocuous manner; he had previously arrested defendant in an illegal and forcible manner in a situation where, as at bar, defendant was sought as a witness. (See pp. 6-7, supra.) The District Court does not even acknowledge that this prior arrest was anything other than proper.

The District Court's conclusion that defendant's previous arrest by Sgt. McCormick did not have a coercive effect on defendant with respect to the instant

arrest, avoids the must crucial fact - that the prior arrest of this 16-year-old was not merely an arrest - it was not even merely an illegal arrest. It was a most flagrant, violent illegal arrest, where Officer McCormick, merely on suspicion that defendant was a witness, threatened to kick in the door to defendant's home to seize him.[9]

The flagrancy of the illegal conduct of Sgt. McCormick in the earlier

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[9] On May 24, 1993, defendant was arrested at his home (Tr. 491-93) - an arrest the trial court expressly found was without probable cause. (C 113) Sgt. McCormick admitted he had gained entry to defendant's home by threatening to kick the door in (Tr. 707), in a situation where the officer knew only that defendant was a witness to a crime. (Tr. 707-11) Sgt. McCormick testified he gained entry by threatening to kick the door down: "I yelled at him to open the door otherwise I would kick it in." (Tr. 707) (See pp. 6-7, supra.)

arrest of defendant as a witness is relevant in determining whether defendant reasonably felt coerced when again arrested (again ostensibly as a witness) at the direction of that same officer. Brown v. Illinois, 422 U.S. 590, 603-04, 45 L.Ed.2d 416 (1975); Collazo v. Estelle, 940 F.2d 411, 421 (9 Cir. 1991).

Having previously been the subject of threatened police violence [by the same Sgt. McCormick] to secure his surrender of 4th Amendment rights, this 16-year-old defendant had reason to believe that he would be subjected to further violence if he did not give a statement, i.e., surrender his 5th and 6th Amendment rights. His experience with the police teaches him: Comply with

their wishes, or they will kick the door down. Surely, this 16 year old, with this prior personal experience with the present lead officer, would reasonably feel coerced into giving up his Miranda rights and making a statement.

The District Court holding that the situation did not amount to coercive police activity, is unreasonable and wrong. The District Court's conclusion, upon *de novo* review, that defendant "voluntarily waived his rights under Miranda," (App. A, p. App. 11), is unreasonable and should be reversed.

B. The Illinois Appellate Court's factual findings cannot be accepted by the District Court where the Appellate Court was proceeding under an improper standard of review.

Because the State Appellate Court utilized an improper standard (App. A,

pp. App. 9-10), it is unreasonable to rely on any of that court's factual findings, because those findings are necessarily colored and influenced by the standard that court erroneously was applying. Accordingly, the District Court should not have accepted any of the underlying factual findings of the Illinois Appellate Court - and for this additional reason the judgment is wrong.

III. The Court of Appeals should have granted certificate of appealability.

Certificate of appealability should have been allowed, for defendant made a substantial showing of denial of a constitutional right, the issues are deserving of further proceedings, the court could resolve them differently, and they are at least debatable among reasonable jurists. Lozada v. Deeds,

498 U.S. 430, 432, 112 L.Ed.2d 956, 960 (1991);[10] Flieger v. Delo, 16 F.3d 878, 883 (8 Cir. 1994).

IV. Alternatively: Defendant should not have to obtain a certificate of appealability; the provisions requiring that he do so, are unconstitutional.

The statute, 28 U.S.C. § 2253(c), facially applies to a State, where the petitioner was successful on his habeas petition. However, as applied via F.R.App.P. 22(b) (App. C, pp. 42-43), certificate of appealability is required only from individuals, and not from States (or their representatives). Thus, the State has a right to appeal, whereas an individual Petitioner has

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[10] A certificate of appealability under the new Act is issued on the same standard as a certificate of probable cause under the prior Act. Lennox v. Evans, 87 F.3d 431 (10 Cir. 1996).

only an opportunity for discretionary review.

It is inherently unfair, in violation of due process, and a denial of equal access to the courts, to treat individuals differently from the way States are treated, for purposes of obtaining appellate review of a District Court's final habeas order

Due process forbids selective treatment of litigants. All litigants, rich or poor, powerful or powerless, are entitled to uniform justice. "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem." Griffin v. Illinois, 351 U.S. 12, 16, 100 L.Ed.2d 891, 897 (1955).[11]

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[11] In Griffin, this Court upheld petitioners' rights to appellate review (continued...)

All are equally entitled to access to the courts.[12] Johnson v. Avery, 393 U.S. 483, 21 L.Ed.2d 718 (1969).

C O N C L U S I O N

For any and/or all of the foregoing reasons, certiorari should be allowed.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

---

[11](...continued)
of their convictions, which had been denied because they could not afford to pay for transcripts of their trials.

[12] The right of access to the courts is expansively construed, as it derives from the express constitutional "Bill of Rights" guarantee of "right to petition." California Transport v. Trucking Unlimited, 404 U.S. 508, 510-11, 30 L.Ed.2d 642, 646 (1972). "Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition. See Johnson v Avery, 393 US 483, 485, 21 L Ed 2d 718, 721 . . . ."

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, ex rel. GABRIEL PEREZ, Petitioner,	)	
vs.	)	No. 98 C 61
WILLIAM D. O'SULLIVAN[1], Respondent.	)	

[*dated October 6, 1998*]

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, DISTRICT JUDGE

Petitioner Gabriel Perez has filed a petition for a writ of habeas corpus

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[1] When petitioner filed his petition, he was in the custody of Thomas Page, the Warden of Menard Correctional Center. Petitioner has since been transferred to the Western Illinois Correctional Center. Both parties agree that William D. O'Sullivan, the Warden of that facility, should be named as the respondent.

pursuant to 28 U.S.C. § 2254. Following a jury trial in state court, petitioner was convicted of first degree murder and sentenced to a term of 39 years in prison. Petitioner's petition contains three claims for relief. For the following reasons, petitioner's petition for habeas relief is denied.

PROCEDURAL HISTORY

Following a jury trial in the Circuit Court of Lake County, petitioner was convicted of first degree murder. Petitioner was sentenced to a term of 39 years in prison. On direct appeal, petitioner presented four claims for review: (1) whether the admission of petitioner's statements violated his [*page 2*] rights under the Fourth, Fifth,

and Sixth Amendments; (2) whether the evidence was sufficient to establish his guilt beyond a reasonable doubt, (3) whether petitioner was denied due process by the introduction of "gang" evidence and the prosecution's argument inviting jurors to rely on their general knowledge of gangs for the purpose of showing petitioner's propensity to commit the offense; and (4) whether petitioner was denied a fair trial by the trial court's refusal to grant the jury's request for the transcript of the testimony of a particular witness. On March 4, 1997, the Illinois Appellate Court affirmed petitioner's conviction and sentence. People v. Perez, No. 2-96-0142, slip op. (Ill. App. Ct. March 4, 1997). Petitioner then filed a

petition for leave to appeal with the Illinois Supreme Court. On October 1, 1997, the Illinois Supreme Court denied the petition for leave to appeal.

Petitioner filed his petition for a writ of habeas corpus with this court on January 7, 1998. Petitioner has raised three grounds for relief in his petition: (1) whether the use of petitioner's statements violated his Fifth and Sixth Amendment rights; (2) whether he was denied due process by the introduction of "gang" evidence and by the prosecution's argument inviting jurors to rely on their general knowledge of gangs; and (3) whether the evidence was insufficient to establish petitioner's guilt by [*sic.*] a reasonable doubt.

ANALYSIS

Petitioner filed his petition for a writ of habeas corpus with this court on January 7, 1998. Accordingly, review of this petition is governed by 28 U.S.C. § 2254 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under amended section 2254, in order for petitioner to demonstrate that a writ of habeas corpus should be granted, petitioner must [*page 3*] show that the claim was adjudicated on the merits in state court and the claim either: (1) resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was

based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). The first phrase of § 2254(d)(1), which authorizes habeas relief when the state court's decision is "contrary to" clearly established federal law as determined by the Supreme Court, pertains only to questions of law. Lindh v. Murphy, 96 F.3d 856, 868 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997). Thus, federal courts are "free to express an independent opinion on all [constitutional] legal issues in the case." Lindh, 96 F.3d at 868-69. The second phrase of § 2254(d)(1), which authorizes habeas relief when the state court's decision "involved an

unreasonable application" of clearly established federal law as determined by the Supreme Court, pertains to mixed questions of law and fact. Id. at 870. This phrase "tells federal courts: Hands off, unless the judgment in place is based on an error grave enough to be called "unreasonable." Id. A state court's application of Supreme Court precedent is reasonable if it is "at least minimally consistent with the facts and circumstances of the case." Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997), cert. denied, --- U.S. ---, 118 S.Ct. 72 (1997). "[W]hen the constitutional question is a matter of degree, rather than concrete entitlement, a ... responsible, thoughtful answer reached after a full

opportunity to litigate is adequate to support [a state court's] judgment." Lindh, 96 F.3d at 871. If a state court asks the "legally correct question [such as] whether the trial judge abused his discretion ... [then] the fact-specific answer cannot be called 'unreasonable' even if it is wrong...." Id. at 876-77. [*page 4*]

In reviewing a petition for a writ of habeas corpus, any determination of a factual issue made by a state court will be presumed to be correct unless petitioner can rebut the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). In addition, a writ of habeas corpus will not be granted unless petitioner has exhausted the remedies available in

state court. 28 U.S.C. § 2254(b).

Petitioner may also procedurally default a claim if petitioner failed to properly and fairly raise the issue on direct appeal or post-conviction review. Rodriguez v. Peters, 63 F.3d 546, 555 (7th Cir. 1995). This court may not consider the merits of petitioner's claim if the claim has been procedurally defaulted. Momient-El v. DeTella, 118 F.3d 535, 542 (7th Cir.), cert. denied, --- U.S. ---, 118 S.Ct. 448 (1997). Procedural default can occur in two ways: (1) petitioner may fail to raise an issue on direct or post-conviction review, Rodriguez, 63 F.3d at 555; or (2) the state court may dispose of a claim on an independent and adequate state law ground, such as a state

procedural bar for failure to properly present a claim. Coleman v. Thompson, 501 U.S. 722, 729 (1991). If a claim is procedurally defaulted, petitioner may be granted a writ on the claim only if petitioner demonstrates cause sufficient to excuse the procedural default and actual prejudice resulting from a failure to obtain review of the merits. Wainwright v. Sykes, 433 U.S. 72, 87 (1977). In order for there to be sufficient cause, there must have been some external impediment that prevented petitioner from raising the claim. Murray v. Carrier, 477 U.S. 478, 488 (1986). Petitioner, in the alternative to demonstrating cause and prejudice, may show that review of the claim is necessary to correct a fundamental

miscarriage of justice. Coleman, 501 U.S. at 750. A fundamental miscarriage of justice is established by demonstrating that it is more likely than not that no reasonable juror would have convicted petitioner in light of any new evidence. Schlup v. Delo, 513 U.S. 298, 327 (1995). [*page 5*]

I. Use of Petitioner's Statements at Trial

A. The state court's decision that petitioner was not "in custody" was not unreasonable

In petitioner's first claim for relief, petitioner argues that the statements he gave to the police were inadmissible because they were made while he was in custody and before he was given a warning of his rights under

Miranda v. Arizona, 384 U.S. 436 (1966). As a result, petitioner argues, his Fifth and Sixth Amendment rights were violated. Respondent has raised the issue that if petitioner is arguing that solely the failure to give the Miranda warnings was a constitutional violation, then petitioner's argument would be barred by the rule in Teague v. Lane, 489 U.S. 288 (1989). Teague forbids courts from applying "new constitutional rules of criminal procedure" on collateral review. Id. at 316. As the United States Supreme Court has stated, however, "[c]laims that state courts have incorrectly decided Miranda issues ... are appropriately considered in federal habeas review." Thompson v. Keohane, 516 U.S. 99, 107 n.5 (1995).

As a result, Teague does not prevent this court from reaching the merits of petitioner's claims.

The first issue is whether petitioner was "in custody" for the purposes of Miranda. In order to make this determination, two inquiries are essential: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." Thompson, 516 U.S. at 112 (footnote omitted). While the first inquiry is "distinctly factual," the second inquiry "calls for application of the controlling legal standard to the historical facts." Id. This second

inquiry is a "mixed question of law and fact." Id. at 112-113.

As explained supra, the second phrase of § 2254(d)(1), which authorizes habeas relief when the state court's decision "Involved an unreasonable application" of clearly established federal law [*page 6*] as determined by the Supreme Court, pertains to mixed questions of law and fact. Lindh at 870. This phrase "tells federal courts: Hands off, unless the judgment in place is based on an error grave enough to be called "[']unreasonable.[']" Id. A state court's application of Supreme Court precedent is reasonable if it is "at least minimally consistent with the facts and circumstances of the case." Hennon, 109 F.3d at 335.

Despite the language and interpretation of § 2254(d) as amended by the AEDPA, petitioner argues that a de novo standard should be used. While the Supreme Court in Thompson applied a de novo standard of review, the Court was applying the pre-AEDPA section 2254 which did not provide for deferential review of the state court's determination of mixed questions of law and fact. Petitioner's citation to United States v. Yusuff, 96 F.3d 982 (7th Cir. 1996) in support of his de novo argument is also unavailing. In Yusuff, the Seventh Circuit applied a de novo standard in the context of a direct review of the defendant's sentence and the district court's denial of her motion to suppress. Yusuff, 96 F.3d at

988. The application of a de novo standard of review on direct appeal is inapplicable to the standard this court must use under § 2254(d), as amended by the AEDPA.

In this case, the Illinois Appellate Court correctly applied the appropriate legal standard to the facts. On page 11 of the court's opinion, the Illinois Appellate Court, citing to Thompson, correctly identified the two essential inquiries that are essential to the determination of whether a person is "in custody." People v. Perez, No. 2-96-0142, slip. op. at 11 (Ill.App.Ct. March 4, 1997). The court also recognized that, pursuant to Ornelas v. United States, 517 U.S. 690 (1996), a de novo standard of review as to the second

inquiry was appropriate. Pérez, slip op. at 11. The Illinois Appellate Court then surveyed the relevant facts of the case: [*page 7*]

> According to testimony, the defendant, an eyewitness to a murder, agreed to accompany the police and another eyewitness to the [police] station to give a statement. The record does not reveal that the defendant's decision to go to the station was not voluntary or that the defendant was ordered to go to the station. Once at the station, there was no indicia that the defendant was seized or in custody. The defendant was not frisked, searched, handcuffed, booked, processed, or arrested. Instead, the defendant followed a police officer into the station, where he talked to his mother briefly and, subsequently, agreed to give a statement to Juvenile Officer Mormino.

Id. at 11-12. After reviewing the totality of the circumstances, the Illinois Appellate Court agreed with the trial court that the petitioner was not

in custody when he spoke to the Juvenile Officer. In light of the Illinois Appellate Court's recognition of the appropriate legal standard and subsequent analysis, this court finds that the Illinois Appellate Court's decision was not unreasonable. The state court's application of Supreme Court precedent in this case was reasonable because it is "at least minimally consistent with the facts and circumstances of the case." Hennon[,] 109 F.3d at 335. Since the decision that petitioner was not in custody was not unreasonable, petitioner's argument that his subsequent statements should be suppressed as "fruit of the poisonous tree" must fail. As a result, petitioner is not entitled to habeas

relief on this ground.

B. Voluntariness of petitioner's waiver of Miranda rights

Petitioner argues that his waiver of his rights under Miranda was not voluntary. This argument has not been procedurally defaulted as respondent has argued. A procedural default may occur when a petitioner fails to raise an issue on direct or post-conviction review. Rodriguez, 63 F.3d at 555. To determine whether an issue has been fairly presented to a state court, this court must look at many factors. Those factors include whether petitioner's argument "(1) rel[ied] on pertinent federal cases; (2) rel[ied] on state cases applying constitutional analysis to a similar factual situation; (3)

assert[ed] the claim in terms so particular as to call to mind a specific constitutional [*page 8*] right; or (4) allege[d] a pattern of facts that is well within the mainstream of constitutional litigation." Momient-El, 118 F.3d at 538-39 (quoting Verdin v. O'Leary, 972 F.2d 1467, 1473-74 (7th Cir. 1992)). "[T]he presence of any one of these factors ... does not automatically avoid a waiver; the court must consider the facts of each case." Id. at 539 (quoting Verdin at 1474).

The argument which petitioner has made in his petition to this court regarding the voluntariness of his waiver is identical to the "voluntariness" argument he made in his brief before the Illinois Appellate

Court. After comparing the two, the language on pages 32-33 of the petition is identical to the language used on pages 39-40 of his state appellate brief. This argument which is in both documents begins with the following sentence:

> Alternatively, the insufficient purported Miranda warnings that were given to defendant, and the way they were given to him, considering his youth (age 16), and preventing defendant from contact with his mother, and the continued questioning by a battery of officers, require a finding that defendant did not knowingly and voluntarily waive his 5th and 6th Amendment constitutional rights as encompassed in the required Miranda warnings.

(Pet. at 32; Pet'r's Illinois Appellate Court Brief at 39.) This argument asserts a claim "in terms so particular" as to call to mind a specific right. Although the presence of one factor does

not automatically avoid a waiver, petitioner's argument regarding the voluntariness of his waiver was fairly presented to the state court.

Since petitioner fairly presented this issue to the state court, this court will proceed to the merits of petitioner's claim. The issue of whether a person has voluntarily waived his or her rights under Miranda is a mixed question of law and fact. See United States v. Mills, 122 F.3d 346 (7th Cir. 1997). As a mixed question of law and fact, this court must, under § 2254(d)(1), evaluate [*page 9*] whether the state court's decision "involved an unreasonable application" of clearly established federal law as determined by the Supreme Court. Lindh at 870.

The first issue is whether the Illinois Appellate Court applied the appropriate legal standard, as determined by the Supreme Court, when it reviewed the trial court's decision regarding the voluntariness of petitioner's waiver. A review of cases of the federal Courts of Appeals is helpful in making the determination whether the appropriate legal standard has been clearly established by the Supreme Court. Until the Seventh Circuit issued its decision in Mills on August 8, 1997, the Seventh Circuit stood alone among the circuits in using a deferential standard of review regarding the ultimate issue of the voluntariness of a Miranda waiver. Mills, 122 F.3d at 349 (footnote

omitted). In Mills, the Seventh Circuit, after considering the Supreme Court's decision in Ornelas v. United States, 517 U.S. 690 (1996), established a new standard of review in this circuit for the voluntariness of the waiver of Fifth Amendment Miranda rights. Mills, 122 F.3d at 347 n.1. The Seventh Circuit determined that Ornelas made it "clear that we ought to join the rest of the Country in holding that the ultimate issue of the voluntariness of a waiver of Miranda rights ought to be reviewed de novo by an appellate court.["] Id. at 350. In coming to this conclusion, the Seventh Circuit held that an appellate court still owes deference to the findings of historical fact and the reasonable inferences drawn by the trier

of fact. Id.

The Illinois Appellate Court's decision in this case came after the Supreme Court's decision in Ornelas but before the Seventh Circuit's decision in Mills. The Illinois Appellate Court discussed the petitioner's argument regarding his waiver of his Miranda rights in two sentences:

> After the Mormino interview, the trial court found that the defendant voluntarily waived his Miranda rights before proceeding to make his statement to Officers [*page 10*] Meadie and Yancey. We have already determined that this finding is not manifestly erroneous.

People v. Perez, No. 2-96-0142, slip op. at 14 (Ill. App. Ct. March 4, 1997). According to this language, the Illinois Appellate Court appears to have applied a deferential standard of review to the

ultimate issue of the voluntariness of petitioner's waiver of his Miranda rights. As explained supra, the Seventh Circuit in Mills believed that Ornelas made it clear that the voluntariness issue should be reviewed de novo. Mills, 122 F.3d at 350. In light of the Supreme Court's decision in Ornelas and the unanimity of the federal Courts of Appeals, this court finds that the Illinois Appellate Court failed to apply the appropriate standard of review when it reviewed the issue of voluntariness under a "manifestly erroneous" standard.

This determination, however, does not automatically result in the granting of the habeas petition. This court must now review the state court's decision regarding petitioner's waiver de novo,

while deferring to that court's findings regarding the historical facts and inferences drawn from those facts. See Mills, 122 F.3d at 350. In regard to the facts of this case, petitioner states in his reply that he does not challenge the Illinois Appellate Court's summary of the facts. (Pet'r's Reply at 1-2.) The following facts relate to the petitioner's waiver of his Miranda rights:

> Further, Sergeant Mark McCormick testified that he asked the defendant to go to a police station and make a statement because the defendant was a witness to the killing. McCormick testified that the defendant agreed to make a statement at the station. However, the defendant testified that he had no choice but to go to the station. Officer Heavey testified that he asked the defendant if he was "ready to go." Officer Heavey testified that he then took both the defendant and Hummel to the station in a "regular

marked police car." Heavey testified that he normally transports witnesses to the station in his patrol car. The defendant and Hummel were not frisked or handcuffed before or during the car ride.

Upon arriving at the station, the defendant was not arrested, handcuffed, booked, or processed. The defendant followed a police officer into the station, where [*page 11*] he was greeted by his mother. He talked to his mother briefly. The defendant then proceeded to give a statement to Juvenile Officer Timothy Mormino. This interview lasted between 30 and 45 minutes. Subsequently, the defendant was interviewed by Officers Donald Meadie and Artis Yancey, who read the defendant warnings pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). During these interviews, the defendant admitted that he had lied and not called his mother. Following the interview with Meadie and Yancey, the defendant was interviewed by Officer Marquez. Following the interview with Marquez, the defendant was interviewed by Lieutenant Shipley and Sergeant Pratt.

Subsequently, the defendant

> was arrested and charged with participating in the murder of Erickson.

People v. Perez, No. 2-96-0142, slip op. at 7-8 (Ill. App. Ct. March 4, 1997).

In order to determine whether a person has knowingly and voluntarily waived his Miranda rights, the court must evaluate the totality of the circumstances. Fare v. Michael C., 442 U.S. 707, 724-725 (1979). Among the many factors a court should consider are the defendant's age, intelligence, education, and experience with the criminal justice system. Watson v. DeTella, 122 F.3d 450, 453 (7th Cir. 1997) (citing Holland v. McGinnis, 963 F.2d 1044, 1052 (7th Cir. 1992)). Nevertheless, "coercive police activity is a necessary predicate to the finding

that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." Colorado v. Connelly, 479 U.S. 157, 167 (1986).

Although petitioner was 16 years old at the time, he was not subject to coercive police activity before he waived his Miranda rights. As the state court found, petitioner was interviewed by the Juvenile Officer for only 30 to 45 minutes before he was read his Miranda rights, which he then waived. The fact that petitioner was transported to the police station by the same police officer who had previously arrested petitioner does not rise to the level of coercive police activity. Moreover, while petitioner was later interviewed

for an extended period of time, the bulk of that time [*page 12*] came after petitioner had already waived his Miranda rights. After reviewing the issue de novo, this court finds that petitioner voluntarily waived his rights under Miranda.

II. Introduction of "Gang" Evidence

In petitioner's second claim for relief, he argues that he was denied due process because of the introduction of prejudicial "gang" evidence at trial, the prosecution's use of that gang evidence in its closing argument, and the failure of the trial court to provide an instruction regarding that evidence to the jury. The "gang" evidence to which petitioner refers is

evidence that petitioner was in a gang and the argument by the prosecution that the jury should rely on their "extrajudicial" knowledge of gangs. Petitioner acknowledged in his reply brief that the Illinois Appellate Court ruled that he had waived the argument regarding the lack of an appropriate jury instruction since he failed to raise that issue before the trial court. (Pet'r's Reply at 25.) As a result, as petitioner acknowledges, any argument regarding the failure of the trial court to instruct the jury properly has been procedurally defaulted.

As for petitioner's other two arguments in regard to this claim, the Illinois Appellate Court's decision regarding the introduction of the gang

evidence and the use of that evidence by the prosecution during closing arguments was not "unreasonable." In regard to the gang evidence in general, the Illinois Appellate Court noted that "[e]vidence which indicates that a defendant is a gang member or was involved in a gang-related incident is admissible to show a common purpose or design or to provide a motive for an otherwise inexplicable act." People v. Perez, No. 2-96-0142, slip op. at 18 (Ill. App. Ct. March 4, 1997). In holding that the admission of the gang evidence was not an abuse of the trial court's discretion in this case, the Illinois Appellate Court remarked that [*page 13*] "error may have accrued had the trial court not admitted the

evidence." Id. (emphasis in original). The Illinois Appellate Court's decision on this issue was not unreasonable.

In regard to the prosecution's comments about the gang evidence in closing argument, the Illinois Appellate Court held that the trial court "did not abuse its discretion in permitting the prosecution to comment that the defendant was not a typical 16-year-old." Id. at 19. The reference to the gang evidence by the prosecutor was, the Illinois Appellate Court held, a reasonable inference based on the evidence introduced at trial. Id. The Illinois Appellate Court also found that the prosecutor's comment was made in response to the defendant's counsel's argument that the defendant was a

normal, average 16-year-old. Id. Finally, the Illinois Appellate Court determined that there was no error in the prosecutor's statement that the jurors consider the evidence based on their own observations, common sense, and experiences in life. Id. In light of the Illinois Appellate Court's application of the facts to the law, this court finds that the state appellate court's decision was not unreasonable. As a result, petitioner's second claim for relief must fail.

III. Alleged Insufficiency of the Evidence

Petitioner's final claim for relief is that the evidence at his trial was insufficient to find him guilty beyond a

reasonable doubt. Under Jackson v. Virginia, 443 U.S. 307 (1979), the "relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319. The Seventh Circuit has explained the analysis a federal court must use when deciding this type of issue: [*page 14*]

> Because Jackson claims are mixed questions of law and fact, we are compelled to hold that a writ of habeas corpus may be issued for evidence insufficiency only if the state courts have unreasonably applied the Jackson standard. Federal review of these claims therefore now turns on whether the state court provided fair process and engaged in reasoned, good-faith decisionmaking when applying Jackson's "no rational trier of fact" test. As we stated in Lindh,

> § 2254(d)(1) "requires federal courts to take into account the care with which the state court considered the subject.... [A] responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment." [Lindh,] 96 F.3d at 871.

Gomez v. Acevevdo, 106 F.3d 192, 199 (7th Cir. 1997), vacated on other grounds, Gomez v. DeTella, --- U.S. ---, 118 S.Ct. 37 (1998).

In this case, the Illinois Appellate Court identified and applied the appropriate standard of review as required by Jackson. See Perez at 15. The Illinois Appellate Court, after a comprehensive recitation of the facts, pointed to the testimony of four witnesses and to the testimony of the petitioner as sufficient to convict him. Id. at 15-16. While agreeing that the testimony of one of the witnesses may

have been a proper area of contention, the Illinois Appellate Court properly stated that the weight and credibility to be given to the testimony of a witness is within the exclusive jurisdiction of the jury as triers of fact. Id. at 17. In light of the appellate court's reasoning, this court finds that the Illinois Appellate Court's decision regarding the sufficiency of the evidence was not unreasonable. As a result, petitioner's third claim for relief must fail. [*page 15*]

CONCLUSION

Based on the above stated reasons, petitioner's petition for a writ of habeas corpus is DENIED. This case is dismissed in its entirety. All other

pending motions are moot.

ENTER:

[signature]
JAMES F. HOLDERMAN
United States District Judge

DATED: October 6, 1998

APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 23, 1999
Decided April 30, 1999

Before

Hon. RICHARD A. POSNER, *Chief Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

GABRIEL PEREZ,
Petitioner-Appellant,

No. 98-4140 v.

WILLIAM D. O'SULLIVAN,
Respondent-Appellee.

Appeal from the United States
District Court for the Northern
District of Illinois, Eastern Division.

No. 98 C 61

James F. Holderman,
Judge.

ORDER

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court

denied the petition and declined to issue a certificate of appealability. Petitioner now has filed an application for a certificate of appealability.

This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED. Request to proceed without a certificate of appealability is also DENIED.

APPENDIX C

STATUTES AND RULES INVOLVED

Federal Rule of Appellate Procedure, Rule 22(b), reads as follows:

"(b) Certificate of Appealability

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals."

(2)

Supreme Court, U.S.
FILED
DEC 10 1999
CLERK

No. 99-201

In the

Supreme Court of the United States

GABRIEL PEREZ,

Petitioner,

v.

WILLIAM D. O'SULLIVAN, Warden,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the statutory requirement that Petitioner obtain a certificate of appealability to proceed in the circuit court while the State does not need a certificate violates the constitutional due process right of access to the courts.

2. Whether Petitioner has established that a certificate of appealability should have been allowed in his case.

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, dated October 6, 1998, of which Petitioner seeks this Court's review, is set forth in Appendix A to the instant Petition. The United States Court of Appeals for the Seventh Circuit declined to issue a certificate of appealability on April 30, 1999. That order is set forth in Appendix B to the instant Petition. Both decisions are unreported.

JURISDICTION

Petitioner's statement of jurisdiction is complete and correct.

CONSTITUTIONAL PROVISIONS

Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall

have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Following a jury trial, Petitioner was convicted of murder. Petitioner appealed his conviction and sentence to the Illinois Appellate Court and that court affirmed Petitioner's conviction and sentence. Petitioner filed a petition for leave to appeal in the Illinois Supreme Court, which was denied. Petitioner subsequently filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Illinois, raising the following three grounds for relief in his petition:

(1) Whether the use of Petitioner's statements violated his Fifth and Sixth Amendment rights;

(2) Whether Petitioner was denied due process by the introduction of "gang" evidence and by the prosecution's argument inviting jurors to rely on their general knowledge of gangs; and

(3) Whether the evidence was insufficient to establish Petitioner's guilt by [sic] a reasonable doubt.

The District Court denied the petition for writ of habeas corpus, holding that the Illinois Appellate Court's decision that Petitioner was not in custody when he spoke with officers was not unreasonable, and that Petitioner voluntarily waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), therefore use of his statements did

not violate his Fifth and Sixth Amendment rights. The court further held that the Appellate Court's decision regarding "gang" evidence was not unreasonable. Finally, the District Court determined that the Illinois Appellate Court identified and applied the appropriate standard to Petitioner's claim that he was not proved guilty beyond a reasonable doubt.

Petitioner then filed a notice of appeal. The United States District Court for the Northern District of Illinois declined to issue a certificate of appealability because Petitioner did make a substantial showing of the denial of a constitutional right. Petitioner then asked the United States Court of Appeals for the Seventh Circuit to issue a certificate of appealability. The court reviewed the final order of the district court and the record on appeal and found no substantial showing of the denial of a constitutional right. The court accordingly denied the request for a certificate of appealability and denied the request to proceed without a certificate of appealability.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE REQUIREMENT THAT HE OBTAIN A CERTIFICATE OF APPEALABILITY.

Petitioner's argument that the provisions requiring Petitioner to obtain a certificate of appealability are unconstitutional must fail, as it is clear that this requirement is not a violation of due process and is not a denial of equal access to the courts. In *United States v. Pearce*, 146 F.3d 771 (10th Cir. 1998), the United States Court of

Appeals held that the government did not need to obtain a certificate of appealability. The court provided the following explanation for why a certificate was not required:

> In the instant case the government did not seek a certificate of appealability. In fact, as defendant points out, the government can never meet the criterion for a certificate of appealability- "[a] certificate of appealability may issue under paragraph 1 only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). The government is never an applicant in a §2255 proceeding, and can never show a denial of a constitutional right.

Pearce at 773. It is well established that the State is not required to obtain a certificate of appealability. *United States ex rel. Tillery v. Cavell*, 294 F.2d 12 (3rd Cir. 1961); *Texas v. Graves*, 352 F.2d 514 (5th Cir. 1965) (No necessity exists for state or its representative to obtain a certificate of probable cause to take an appeal to the court of appeals from a final order granting a writ of habeas corpus to a prisoner detained under process issued by a state court.); *United States ex rel. Calhoun v. Pate*, 341 F.2d 885 (7th Cir. 1965); *Buder v. Bell*, 306 F.2d 71 (6th Cir. 1962).

Furthermore, if the State is filing an appeal, it is because the United States District Court has granted a writ of habeas corpus. If a writ has been granted, that alone establishes a clear disagreement between courts, as the state court determined that there was no violation of the Petitioner's constitutional rights, while the United States District Court found that there was. With this obvious conflict established before the State would ever seek to appeal, the State would have met the require-

ments for obtaining a certificate of appealability. A petitioner seeking a certificate of probable cause must show not that he would prevail on the merits of his claim, but that issues are debatable among jurists of reason. *Barefoot v. Estelle*, 463 U.S. 880 (1983), *Rector v. Johnson*, 120 F.3d 551 (5th Cir. 1997). If the State is appealing the granting of petition for writ of habeas corpus, it is automatically established that there is an issue of debate among jurists of reason.

Furthermore, Petitioner states that it is "inherently unfair . . . to treat individuals differently from the way States are treated. . ." It is unfair to treat similarly situated individuals differently, however, it is not the same in a situation where the parties are not in any way similar. In this situation, the State would not be receiving "selective treatment" as Petitioner claims. Instead, the State does not have to obtain a certificate because it could not possibly have the same violation of constitutional rights claims that an individual could have.

II.

PETITIONER HAS FAILED TO ESTABLISH THAT A CERTIFICATE OF APPEALABILITY SHOULD HAVE BEEN ALLOWED IN HIS CASE.

The District Court declined to issue a certificate of appealability because Petitioner did "not [make] a substantial showing of the denial of a constitutional right." (Appendix A). The Circuit Court of Appeals denied the request for a certificate of appealability and the request to proceed without a certificate of appealability, stating that "This court has reviewed the final order of the dis-

trict court and the record on appeal. We find no substantial showing of the denial of a constitutional right." The decision to grant a certificate of appealability is a discretionary one. As this Court has found, "It is not for this Court to prescribe how the discretion vested in a Court of Appeals, acting under 28 U.S.C. § 2253, should be exercised. (Citation omitted). As long as that court keeps within the bounds of judicial discretion, its action is not reviewable." *In Re Application of Burwell*, 350 U.S. 521 (1956). Because Petitioner has failed to establish how the courts erred in the decisions to not allow the certificate of appealability, Petitioner cannot now raise the substantive claims that would have been present for appeal if either of those courts had issued a certificate of appealability as to one or more of these issues. In the extraordinary situation that this Court were to find that Petitioner should have received a certificate of appealability, the remedy available to Petitioner should not be for this Court to consider the merits of Petitioner's fact specific claims. Instead, this Court should simply direct the United States Court of Appeals for the Seventh Circuit to consider Petitioner's appellate claims. It is an impractical use of this Court's time to review fairly generic claims like those Petitioner is raising, as they would require nothing more than error correcting, which is not this Court's traditional role. Therefore, this Court should not consider any of the underlying claims that Petitioner argues should have been present on appeal had a certificate of appealability been granted by either court.

This Court held in *Hohn v. United States*, 524 U.S. 236 (1998), that this Court does have jurisdiction to review

denials of applications for certificates of appealability. However, in that case, this Court limited its grant of certiorari to the following question: "In light of the fact that the Court of Appeals denied the petitioner's request for a Certificate of Appealability, does this Court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Acting Solicitor General?" *Hohn*, 524 U.S. 236 (1997). This Court held that it had jurisdiction and remanded the case, stating, "in light of the position asserted by the Solicitor General . . . the decision of the Court of Appeals is vacated and remanded for further consideration." *Hohn*, 524 U.S. at 253. This Court therefore has determined that it does have jurisdiction to consider an appeal of the denial of the certificate of appealability. However, it does not logically follow that this Court then has jurisdiction over the underlying claims raised in the original petition for writ of habeas corpus.

It is established that to obtain a certificate of appealability, a petitioner need not show that he would win on the merits of his claims, only that there was a substantial showing of the denial of a federal right. *Barefoot v. Estelle*, 463 U.S. 880 (1983). Petitioner must only show that a court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further. *Clark v. Lewis*, 1 F.3d 814 (9th Cir. 1993). Because Petitioner did not need to establish that he would prevail on the merits to have the certificate of appealability granted, this Court also does not need to consider the merits of the underlying claims to determine that the United States District Court for the Northern District of Illinois and the United States

Court of Appeals for the Seventh Circuit properly denied the request for a certificate of appealability.

CONCLUSION

This case does not present this Court with questions of general importance compelling the exercise of scarce and valuable judicial resources for a merits review. For all of the reasons set forth above, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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